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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1978.

PROTECTION MARITIME INSURANCE COMPANY, LTD., ET AL.,
PETITIONERS,

v.

JOHN PINO, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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JOHN E. SUTHERLAND

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v.

JOHN PINO, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on May 30, 1979.

Opinions Below.

The opinion of the District Court for the District of Massachusetts is printed in Appendix C, pp. 31-62 hereto and is not yet reported in the reporters.

The opinion of the Court of Appeals, which affirmed in part and reversed in part the judgment of the District Court for the District of Massachusetts, is printed in Appendix A, pp. 15-28, hereto and is not yet reported in the official reports.

Jurisdiction.

The judgment of the Court of Appeals, printed in Appendix B hereto, was made and entered on May 30, 1979, and copies thereof are appended to this petition in the Appendix at pp. 29-30. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Does admiralty have jurisdiction over the tort of interference with the advantageous relations of seamen with their employers?
2. Does admiralty have the authority to award injunctive relief?

Constitutional Provisions, Statutes and Rules Involved.

The constitutional provision involved is Art. III, § 2 of the United States Constitution. The statute giving the District Court power to assume jurisdiction is 28 U.S.C. § 1333. The rule giving District Courts power to issue injunctions is Fed. R. Civ. P. 65. Federal Rule of Civil Procedure 82 states that the unification of admiralty and civil rules shall not affect jurisdiction. The Admiralty Extention Act, 46 U.S.C. § 740, extends the admiralty jurisdiction to cover ship to shore accidents. These are set forth in Appendix D at pp. 63-67.

Statement of the Case.

Petitioners are a British insurance underwriter, an American insurance agency, and a Massachusetts insurance broker. The Respondents are eight of the original fourteen plaintiff seamen working at one time or another out of Gloucester, Massachusetts.

The basic facts, which are not in dispute, are as follows:

Petitioners charged higher insurance premiums to the owners of vessels on which the Respondents worked. The case was tried before a judge sitting in admiralty in the District of Massachusetts. The District Court found that the Respondents encountered great difficulty finding employment as a result of the Petitioners' higher premiums, that higher premiums were unjustified as to eight of the original fourteen plaintiffs and that Petitioners had tortiously interfered with their employment rights. The suit was alleged to be within the admiralty jurisdiction of the Court and both injunctive relief and damages were sought.

In addition to a determination of liability, the Court also found the Petitioners' practice of requiring "settlement sheets," which contain the names and addresses of every member of the crew after all trips completed by vessels Petitioners insured, was improper and awarded interim injunctive relief pending a hearing on the issue of damages. The injunction enjoined Petitioners from:

1. charging any additional premium to the owner of any commercial fishing vessel because he has signed on as a crewmember any one or more of plaintiffs Powers, Nugent, Vaiarella, Pino, Thompson, Taylor, Susanno, and Matthews; and

2. demanding as a condition for the issuance, maintenance, or continuation of any insurance policy that the owner of the fishing vessel make available to any of the

three defendants named above a settlement sheet which contains the names of any crewmember.

Petitioners appealed to the Court of Appeals from the judgment and temporary injunction under 28 U.S.C. § 1292 (a)(3), which allows appeals in admiralty cases when liability has been determined.

The Court of Appeals upheld the judgment and upheld the Order of the Massachusetts District Court in part and reversed in part on May 30, 1979. On June 20, 1979, the Court of Appeals issued its mandate. The Court of Appeals upheld the Order regarding charging additional premiums as to the eight Respondents and reversed the Order which prohibited the collection of "settlement sheets."

Reasons for Granting the Writ.

This petition raises substantial and important questions and should be reviewed because the holding below expands the subject matter jurisdiction of the Admiralty Court far beyond constitutional and statutory limits, and is in direct opposition to recent Supreme Court holdings.

Secondly, it has been a deeply-rooted rule of admiralty jurisprudence that Admiralty Courts have not had the power to award "barebones" equitable relief. The decision is contrary to Supreme Court doctrine, the law in other circuits and changes the law in the First Circuit.

1. The Massachusetts District Court erroneously found admiralty jurisdiction in a case of interference with advantageous relations by an insurance company with the relations of seamen with various fishing vessel owners. The decision, which was upheld by the Court in this respect, will open the floodgates for cases to the Admiralty Courts.

Admiralty jurisdiction was erroneously granted where the alleged torts were not committed upon the navigable waters. Further, plaintiffs and defendants were not related by any other maritime relationship.

The Admiralty Court has jurisdiction in actions in tort and contract but different tests are applied to each. In contract, there is admiralty jurisdiction only where there is a direct maritime connection. *DeLovio* v. *Boit,* 7 F. Cas. 418, 426 No. 3776 (C.C. D. Mass. 1815); *Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1851). The District Court did not find jurisdiction on the basis of any contract but adopted the Restatement (First) of Torts § 766 (1939), as a rule of decision.

Admiralty tort jurisdiction was originally "exclusively dependent on the location of the wrong." *Thomas* v. *Lane,* 23 F. Cas. 957, 960 (CC. D. Me. 1813). That test proved overly broad to the courts because it provided for jurisdiction for swimmers, victims of airline crashes over water and other such incidents which were clearly not intended to be within admiralty. The Courts have imposed a further test designed to restrict the jurisdiction of the Admiralty Court. The further requirement is that of maritime nexus or connection. *Chapman* v. *City of Grosse Pointe Farms,* 385 F. 2d 962 (6th Cir. 1967); *Hess* v. *United States,* 259 F. 2d 285 (9th Cir. 1958); *Adams* v. *Montana Power Co.,* 354 F. Supp. 1111 (D. Mont. 1973). In *Executive Jet Aviation, Inc.* v. *City of Cleveland,* 409 U.S. 249 (1972) this Court unanimously established that more than a maritime locality was necessary and that a maritime nexus or connection must also be present. *Executive Jet* stands for the proposition that, "[a] maritime locality . . . is not a sufficient predicate for admiralty jurisdiction in aviation tort cases." 409 U.S. at 261. The Court further stated, "It is far more consistent with the his-

tory and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." 409 U.S. at 268. The established test is two-part and both elements must be met to warrant admiralty jurisdiction.

The addition of the maritime nexus requirement was restrictive rather than expansive to admiralty. The holding in *Executive Jet* is contrary to the decision in this case and in the case of *Carroll* v. *Protection Maritime Insurance Co., Ltd.*, 512 F. 2d 4 (1st Cir. 1975). *Executive Jet Aviation* is not precedent for finding that a maritime nexus is sufficient to warrant maritime jurisdiction. The First Circuit Court was incorrect because it is essential also that there be a maritime locality.

In this case the Court of Appeals purported to rely on *Executive Jet Aviation* as announcing that the emerging test for admiralty jurisdiction is a maritime connection rule. This interpretation will have a disastrous effect on the Admiralty Court because it expands jurisdiction beyond any constitutional or statutory limits.

The United States Constitution, Art. III, § 2 grants the Federal Courts power to administer the maritime law by extending the "judicial power [of the United States] . . . to all Cases of Admiralty and Maritime jurisdiction." The constitutional grant was implemented in Section 9 of the Judiciary Act of 1789, 1 Stat. 76-77, wherein:

> . . . the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

This has remained the law of the land to the present, although the language has been changed in phraseology, and it is now known as 28 U.S.C. § 1333:

> The District Court shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

There was and is a federal interest that can be implemented by dealing with the major concerns of the shipping industry. However the Court's jurisdiction does not reach as far as the last ranch that sends cattle to port or to the seaman on a drive from Kansas City to New Bedford. The founding fathers sought to protect the maritime industry from the whims of the various states and to foster trade. The jurisdictional statutes were designed to perpetuate this special industry court for the maritime industry. The Supreme Court has carefully protected and restricted the access to the Admiralty Court, most recently in the *Executive Jet Aviation* case and has has preserved the protections afforded the industry by the founding fathers.

If it is a maritime tort to act in a way which will prevent the Petitioners from providing a maritime service, an automobile accident in which a mariner broke his leg would be a maritime tort. A sailor on shore leave who is hit on the head with a whisky bottle or contracts venereal disease, has a cause of action cognizable under the admiralty jurisdiction. Questions arise as to whether the maritime connection depends upon the existence of a maritime claim against another defendant or, could the plaintiff sue the insurer independent of whether there is a contract breach by the employer? In the case of our sportive sailor, could the vessel owner implead the wielder of the bottle or the lady of the night?

The case below also raises the question of whether it and the *Carroll* decision make the Admiralty Extension

Act, 46 U.S.C. § 740, irrelevant. The Admiralty Extension Act was designed primarily to deal with the ship to shore accident, it having been held that the damage to the shore structure did not give rise to a maritime cause. It would appear that adoption of a maritime connection doctrine unlimited by location would make the Act meaningless. *See,* Lucas, J. D., Cases and Materials on Admiralty (2d ed. 1978).

2. The Massachusetts District Court granted "barebones" equitable relief in a case involving a maritime subject. In so doing, the District Court disregarded a deeply-rooted rule of admiralty jurisprudence that an Admiralty Court lacks power to grant equitable relief.

This case raises the question whether the 1966 amendment of the Federal Rules of Civil Procedure, which unified civil and admiralty procedure, authorizes the District Courts to exercise equity power in admiralty matters.

The doctrine was founded in conjunction with the ancient distinction between law, admiralty, and equity. The doctrine was voiced by the Supreme Court in *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454, 457-458 (1935).

The First Circuit Court, as recently as 1975 in the case of *Carroll* v. *Protection Maritime Insurance Co., Ltd.,* 512 F. 2d 4, 9 (1st Cir. 1975), indicated that equitable relief was not available from Admiralty Courts.

In its opinion in this case the First Circuit Court stated that the case squarely presented the Court with the question whether injunctive relief is appropriate, in accordance with Fed. R. Civ. P. 65, in admiralty cases and determined that the same principles apply in admiralty cases as with civil actions.

The Court openly cast aside the traditional rule and stated:

> This is a departure from the traditional rule, but we find no constitutional, statutory or policy reasons of substance for recognizing a continued limitation upon the power of federal courts sitting in admiralty, nor does it seem likely that the Supreme Court would today adhere to the traditional rule. *See Swift & Co., supra,* 339 U.S. at 692. District courts sitting in admiralty, which now operate under virtually the same procedures as they do otherwise, should be able to provide the kind or degree of remedy that will properly and fully redress an injury within their jurisdiction, in keeping with the same principles they would apply in other comparable cases. *See Swift & Co., supra,* 339 U.S. at 691; Law of Admiralty 43.

(Appendix A, p. 25.)

The unification of civil and admiralty practice in 1966 did not do away with the distinctions between the two nor was it designed to change the substantive law of admiralty as has been done in this case. It would be erroneous to presume that it was the intent that "unification" converted "admiralty" actions into "civil" actions thereby authorizing the Court to grant injunctive relief, because it has been suggested that, "presumably all statutory language using the words 'civil action' now applies to what we used to call admiralty [Fed. R. Civ. P. 2]." Zobel, *Admiralty Jurisdiction, Unification and the American Law Institute,* 6 San Diego L. Rev. 375, 388 (1969). The consequence of such an interpretation is clearly contrary to the intent and would result in subjecting maritime parties to the whim of the various state courts.

The Rules of Decision Act, 28 U.S.C. § 1652 (1964), provides that: "[t]he laws of the several states, except where the Constitution or treaties of the United States or

Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." "If 'civil actions' merely represents the plural of the phrase in Rule 2 [Fed. R. Civ. P. 2] then perhaps unwittingly unification has brought the *Erie* doctrine into maritime litigation." Zobel, *supra*, p. 388.

> If either Congress, the courts or both can enlarge the jurisdictional description of admiralty cases to include maritime matters praying bare, nonancillary equitable relief, and if such an enlargement would pass constitutional muster, then it seems reasonable to ask that we receive along those lines at least a positive inkling either statutory or decisional. Instead, all we have so far is continuing Congressional silence, and from the Supreme Court this: "Unquestionably a court of Admiralty will not enforce an independent equitable claim merely because it pertains to maritime property." [Swift & Co. Packers v. Compania Columbiana del Caribe, 339 U.S. 684, 690 (1950).]

Zobel, *supra*, pp. 390-391.

Another practical reason why there was no intent to confer equity power on an Admiralty Court by the 1966 unification is that *all* equity cases which are presently outside the admiralty jurisdiction would be swept within it. This would be a significant jurisdictional change affecting the types and numbers of cases heard by the Federal Courts.

It has long been settled in this country that a Federal Court sitting in admiralty has no power to grant equitable relief in a direct proceeding for that purpose. *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454 (1935).

It is importantant to distinguish, in this regard, between the application of equitable principles and the power to afford equitable relief. There is language in a number of cases to the effect that admiralty applies equitable principles. *United States* v. *Cornell Steamboat Company,* 202 U.S. 184 (1906); *The Eclipse,* 135 U.S. 599 (1890); *Watts* v. *Camors,* 115 U.S. 353 (1885). The U.S. Supreme Court has indicated, however, that: "[w]hile the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity." *The Eclipse*, *supra* at 608.

It is respectfully submitted that the "unification" of civil and admiralty practices, as accomplished by the 1966 amendment of the Federal Rules of Civil Procedure, did not affect the principle that an Admiralty Court has no power to grant an injunction. The "unified" rules contain several provisions explicitly prescribing distinctive treatment for admiralty and maritime claims. *See, e.g.,* the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. A-F. It seems clear that the "unification" did not create new substantive admiralty causes of action. By granting injunctive relief in the instant case, the District Court in effect assumed the power to entertain an equitable action to enjoin the commission of a maritime tort. Neither Congress nor the U.S. Supreme Court has specifically extended the power of the Court sitting in admiralty to the granting of equitable relief. It is submitted that before a Federal Court can grant equitable relief in a case not involving diversity or a federal question, Congress or the Supreme Court will have to clearly indicate so. Zobel, *Admiralty Jurisdiction, Unification and the American Law Institute,* 6 San Diego L. Rev. 375, 394 (1969). Rule 82 of the Federal Rules of Civil Procedure provides "[t]hese rules shall not

be construed to extend or limit the *jurisdiction* of the United States district courts . . ." (emphasis provided).

While a number of lower Federal Courts have had an opportunity to consider the effect of "unification" on the issue of equitable relief in admiralty cases, nevertheless, most of these Courts have been reluctant to take such a dramatic step and have decided the cases before them on other grounds. *See, e.g., Lewis* v. *S.S. Baune,* 534 F. 2d 1115 (5th Cir. 1976); and *Beverly Hills National Bank & Trust Co.* v. *Compania De Navegacione Almirante S.A. Panama,* 437 F. 2d 301 (9th Cir. 1971), *cert. denied,* 402 U.S. 996 (1971); *Thyssen Steel Corp.* v. *Federal Commerce & Navigation Co.,* 274 F. Supp. 18 (S.D. N.Y. 1967).

Fed. R. Civ. P. 82.

JURISDICTION AND VENUE UNAFFECTED

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

It would appear that *inter alia,* the purpose of Rule 82 is to preclude conflict with Article III of the United States Constitution which provides in part: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." U.S. Constitution Art. III, § 2. Obviously, admiralty jurisdiction is limited by the Constitution and congressional legislation implementing the constitutional provisions. It is equally clear that procedural rules promulgated by a Court cannot expand the confines of jurisdiction. *Washington Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 635 (1924). The U.S. Supreme Court has the ability, under its rule-making power, to regulate the "practice" in the Federal Courts, but it has no authority to enact substantive law. *The Goyaz,* 281 F. 259 (S.D. N.Y. 1922), *aff'd,* 3 F. 2d 553 (2d Cir. 1924), *cert. denied,* 267 U.S. 594 (1925). Any rule regulating jurisdiction would be substantive. *Aktieselskabet Fido* v. *Lloyd Braziliero,* 283 F. 62, 73-74 (2d Cir. 1922), *cert. denied,* 260 U.S. 737 (1922). It is submitted that the equity power doctrine is a matter of jurisdiction. *See* Zobel, *supra* at 382-95. Any interpretation to the effect that unification has extended the equity power to the Court in admiralty would be an expansion of the admiralty jurisdiction of the Court and contravene Article III and Rule 82.

As early as 1890, the U.S. Supreme Court recognized that equitable remedies were not within the admiralty jurisdiction of the Court. *The Eclipse,* 135 U.S. 599 (1890). This jurisdictional barrier to equitable remedies was made abundantly clear in *The Eclipse* where the Court stated that admiralty was unable to "entertain a bill or libel for specific performance, or to correct a mistake . . . declare or enforce a trust or an equitable title . . . exercise jurisdiction in matters of account merely . . . decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them." 135 U.S. at 608. *See generally,* Morrison, *The Remedial Powers of the Admiralty,* 43 Yale L.J. 1 (1933).

It has been said that the Constitution set up a tripartite jurisdictional scheme of law, equity, and admiralty. In an 1823 opinion, *The Sarah,* 21 U.S. (8 Wheat.) 391, Chief Justice Marshall stated that although law and admiralty are "vested in the same tribunal, they are as dis-

tinct from each other as if they were vested in different tribunals." *Id.* at 394. *See also,* Fiddler, *The Admiralty Practice in Montana and All That,* 17 Me. L. Rev. 15 (1965).

In the case of *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354 (1959), in which the Supreme Court held th[illegible]aims under the general maritime law are outside t[illegible]neral federal question jurisdiction, Justice Frankf[illegible] explained the result as preventing the disemboweln[illegible]t of "the federal admiralty courts which have played such a vital role in our federal judicial system . . . ." *Id.* at 369.

The Constitution set up a tripartite jurisdictional scheme in which admiralty lacked the jurisdiction power of law and equity and it is difficult to contemplate that mere unification of the admiralty and civil rules could alter this jurisdictional scheme.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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On the Petition:
JOHN E. SUTHERLAND

Appendix A.

United States Court of Appeals
For the First Circuit

No. 78-1418

JOHN PINO, ET AL.,
PLAINTIFFS, APPELLANTS.
v.
PROTECTION MARITIME INSURANCE COMPANY, LTD., ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ANDREW A. CAFFREY, *U.S. District Judge*]

Before COFFIN, *Chief Judge,*
CAMPBELL and BOWNES, *Circuit Judges.*

Carroll E. Ayers, with whom *Bernard M. Ortwein, II,* and *John E. Sutherland,* were on brief, for appellants.
Morris D. Katz, with whom *Ronald B. Horwitz,* was on brief, for appellees.

May 30, 1979

CAMPBELL, *Circuit Judge.* This admiralty case involves allegations that the defendant maritime insurance companies,[1] owned and operated by Ernest Enos, were "blacklisting" plaintiff-appellees (a group of seamen working, at one time or another, out of Gloucester, Massachusetts) by demanding higher insurance premiums from the owners of vessels on which they worked. The plaintiffs claimed, *inter alia,* that the higher premiums were unjustified and

[1] The named defendants also included the vessel owners, but they were not the real parties in interest and no judgment against them was entered.

that the defendants had tortiously interfered with their employment rights.[2] Their suit was alleged to be within the admiralty jurisdiction of the federal courts, and both injunctive relief and damages were sought.

The case was tried to a judge sitting in admiralty in the district of Massachusetts. The court found that defendants insured 70% to 75% of the Gloucester fishing fleet at regular annual premiums of, in 1971, $650 to $800 per crewman. These rates were comparable to those of defendants' competitors. The court also found, however, that defendants required the owners of vessels to send them a "settlement sheet" containing the name and address of every member of the crew after all fishing trips completed by vessels they insured. These sheets were reviewed by Enos in part to learn whether any seamen who allegedly created a "special risk of loss" had been aboard. When such seamen were identified, the vessels owners were told that they would have to pay higher premiums—sometimes as much as an additional $6,500—to cover these men. As a result, the named seamen encountered great difficulty finding employment. The court also found that the practice of requiring settlement sheets began after defendants, as a result of prior litigation, were enjoined from using an exclusionary endorsement system, under which specific seamen were excluded from coverage under insurance policies.[3] It held that eight of the fourteen plaintiffs had been designated

[2] The plaintiffs made other statutory claims (*e.g.*, allegations of antitrust violations) that were without merit and are not pressed on appeal.

[3] That system, which also interfered with the named seamen's ability to find employment, had been found to have been adopted with malice and to be beyond the scope of defendants' legitimate business privilege. *See Pino* v. *Trans-Atlantic Marine, Inc.*, 358 Mass. 498, 265 N.E.2d 583, 586-87 (1970); *Protection Maritime Insurance Co.* v. *Foley*, No. 70-1116-G (D. Mass. Nov. 16, 1971); *Foley* v. *Trans-Atlantic Marine, Inc.*, No. 18328 (Essex Super. Ct. June 18, 1970).

high-risk seamen under the added premium system not for legitimate risk-related reasons, but because they had filed personal injury claims against the defendant insurance companies and had prosecuted their claims to judgment, instead of settling them to Enos' satisfaction.

The court adopted the Restatement (First) of Torts § 766 (1939), as a rule of decision. It found that defendants' economic pressure exerted on the boat owners was "a purposeful inducement and cause . . . to disrupt or abort the relationships of employment at will existing between the fishermen and the boat owners," and held that, "defendants' intentional tortious interference with plaintiffs' employment relationships was not privileged." *See* Restatement (First) of Torts §§ 767, 769 (1939).

The court awarded interim injunctive relief pending a hearing on the issue of damages. That injunction enjoined defendants from:

> "1. charging any additional premium to the owner of any commercial fishing vessel because he has signed on as a crewmember any one or more of [the eight prevailing plaintiffs]; and
>
> 2. demanding as a condition for the issuance, maintenance, or continuation of any insurance policy that the owner of the fishing vessels make available to any of the three defendants . . . a settlement sheet which contains the names of any crewmember."

It is from this judgment and temporary injunction that defendants appeal. *See* 28 U.S.C. § 1292(a)(1).

Defendants challenge the admiralty jurisdiction of the court and argue that, even if the court did have jurisdiction, it was not empowered to grant injunctive relief. Alternatively, they argue that the injunction exceeds the scope of the court's authority—that it is punitive, overbroad, harsh and disproportionate to the tortious conduct on which it is based. In respect to the finding of liability,

they argue that the court erred in finding that their acts were not privileged business conduct and in relying on certain evidence.

JURISDICTION

Defendants argue that plaintiffs' tort claims are not within the admiralty jurisdiction of the federal courts, *see* U.S. Const. art. III, § 2; 28 U.S.C. § 1333, and ask us to overrule our decision to the contrary in *Carroll* v. *Protection Maritime Insurance Co.*, 512 F.2d 4 (1st Cir. 1975). In *Carroll* we directly confronted the question presented here: whether admiralty jurisdiction extends to allegations by seamen that an insurance company—coincidentally the same company involved here—has tortiously interfered with their maritime employment rights. We held that it does. *Id.* at 5-9; *see Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 259-60 (1972). Defendants cite no conflicting legal authority that has emerged since then. Nor do they present any arguments not there considered.[4] We decline to depart from a position taken only four years ago. *See Gavin* v. *Chernoff*, 546 F.2d 457, 458-59 (1st Cir. 1976).

LIABILITY

Defendants challenge the finding of liability on two grounds: one, that the court admitted and considered evidence that should have been excluded, and two, that it misapplied the governing substantive legal principles.

Admission of Evidence: Defendants object to the admission of hearsay statements of a deceased, Eugene Marshall. The court apparently viewed one of these as a "statement

[4] Defendants' suggestion that we did not consider the effects of the Admiralty Extension Act, 46 U.S.C. § 740, in *Carroll* is unpersuasive, as that Act, although not mentioned in our decision, was discussed in the cases we cited.

of fact by the decedent . . . made in good faith before the case" under Mass. Gen. L. c. 233, § 65. Defendants correctly point out that the Federal Rules of Evidence should have been the governing standard. *See* Fed. R. Evid. 101.[5]

One of the challenged statements was to the effect that Marshall, an insurance broker working at least in part for Enos, told plaintiff Powers that he could not pay Powers' hospital and doctors bills incurred after Powers sustained a hernia after a fire. There was also Marshall's purported statement, when discharging Powers as skipper of a vessel Marshall owned, that he was doing so because Powers was on the "boat 'blacklist.' "[6]

Plaintiffs argue that, if the Massachusetts rule was not applicable, these nevertheless were statements against interest and therefore were admissible under Fed. R. Evid. 804(b)(3), in that they were:

> "at the time of [their] making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement[s] unless he believed [them] to be true."

We think Rule 804 inapplicable to the first statement. It in no way implicated Marshall as a possible tortfeasor. Nor did it threaten Marshall's business relationship with Enos. In stating that he could not pay Powers' medical expenses, however, Marshall was speaking in his capacity as a broker for Enos. This was therefore an admission by

[5] Incredibly, although this case was tried in 1977, plaintiffs defend the ruling by relying on the pre-1972 version of Fed. R. Civ. P. 43, which referenced to the law of the state in which the federal court was sitting. Plaintiffs' counsel appears unaware that the rule was changed.

[6] In between the times when these statements allegedly were made by Marshall, Powers sought legal assistance in pressing his insurance claim.

a party opponent and admissible under Fed. R. Evid. 801(d)(2)(D). The second statement, referring to the blacklist, was admissible as a statement against interest under Fed. R. Evid. 804. It tipped Enos' and Marshall's hand by acknowledging that a blacklist existed and that Marshall's action was taken because Powers' name was on it.

Defendants also object to the admission of allegedly hearsay statements attributed by plaintiffs to various boat owners and captains, not all of whom were named defendants. One instance cited is Powers' testimony that he was turned down for jobs on twenty boats because the owners would have had to pay an additional $1,000 in insurance premiums to cover him. Enos himself testified, however, that he required an additional $1,500 to cover Powers, and various boat owners testified that the added premium deterred them from hiring Powers. Assuming, without deciding, that the testimony was inadmissible, no prejudice could have resulted. The same is true as to similar hearsay testimony by plaintiff Vaiarella—similar corroborating evidence was introduced as to the premium charged and its effect on the boat owners. That some of Powers' and Vaiarella's testimony was "layered hearsay"—statements as to what various boat owners and captains told plaintiffs they had been told by the insurers—leads to no different result.

Defendants' remaining objections are not set forth with enough specificity to warrant detailed consideration. Our review of the record reveals no likelihood of prejudice from any of the allegedly erroneous evidentiary rulings. Nor have defendants met their burden of showing that the district court's findings of fact, including its findings on the credibility of the witnesses, were clearly erroneous. Fed. R. Civ. P. 52(a).

Application of Substantive Law: The district court adopted the Restatement (First) of Torts § 766 (1939) as "a recognized national standard from which to fashion a controlling principle of substantive federal maritime law." That section provides in pertinent part:

> "[O]ne who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or
>
> (b) enter into or continue a business relationship with another
>
> is liable to the other for the harm caused thereby."

This standard has been applied in similar cases by the Massachusetts state courts. *E.g., Pino* v. *Trans-Atlantic Marine, Inc.*, 358 Mass. 498, 265 N.E.2d 583, 587 (1970). We find no error.

Defendants argue that because plaintiffs did not work under long-term employment contracts, any refusal to hire was not a breach of contract within § 766(a), but rather fell within § 766(b). *See* Restatement (First) of Torts, § 766, Comment c. A finding of a violation of § 766(b) requires that the alleged tortfeasor have acted with the purpose of deterring one from dealing with another, Restatement (First) Torts § 766, Comment d, and here, defendants assert, their only purpose was the legitimate one of covering their insurance risks. The court, however, found that this was not so—that,

> "eight of the fourteen plaintiffs were designated as added-premium seamen not for legitimate risk-related reasons but because of their inability to amicably settle insurance claims to Enos' satisfaction, and because of their retention of counsel, filing of personal injury actions, and prosecution of those claims to judgment, as they had every right to do."

The court further found that defendants knew that the exorbitant added premiums would cause ship owners to

discharge plaintiffs and would discourage plaintiffs from seeking legal representation and making work-related injury insurance claims. These findings, which are not clearly erroneous, sustain the finding of purposeful conduct. *See* Restatement (First) of Torts § 766, Comment d; W. Prosser, Law of Torts § 8, at 31-32 (4th ed. 1971).

By the same token, the court did not err in finding that defendants had exceeded the limits of legitimate business privilege. *See* Restatement (First) of Torts §§ 767, 769, 771. The burden of proving otherwise was on defendants. *Carroll, supra,* 512 F.2d at 6, and they did not do so. There is no privilege to deter people from exercising their legal rights by penalizing those who do. The sections defining business privileges all contain provisions indicating that defendants' conduct, as found by the court, would not be within their scope: there are no "social interests" in protecting defendants' conduct, § 767(c), and §§ 769 and 771 do not apply if the actor employs improper means, §§ 769(a), 771(c).

AUTHORITY TO GRANT INJUNCTIVE RELIEF

The major question raised on appeal is whether a court sitting in admiralty has the authority to award injunctive relief. Defendants argue that it cannot, pointing out, correctly, that admiralty courts historically have been thought not to have that power. *See* G. Gilmore and C. Black, Law of Admiralty 40-43 (2d ed. 1975) [hereinafter Law of Admiralty]; H. Zobel, "Admiralty Juridiction, Unification, and the American Law Institute," 6 San Diego L. Rev. 375 (1969). This doctrine was anchored in the traditional common law distinction between law, admirality and equity, and was voiced by the Supreme Court in *Schoenamsgruber* v. *Hamburg American Line,* 294 U.S. 454, 457-58 (1935) (dicta). But the Court, while it has assumed, has in few, if any, cases held that injunctive relief is not available, *see* Law of Admiralty 43, and its

later decisions have taken a somewhat different tack. In *Swift & Co. Packers* v. *Compania Columbiana Del Caribe, S.A.,* 339 U.S. 684 (1950), the Court held that an admiralty court disposing of a claim against a shipper for lost goods had jurisdiction to determine whether the shipper had fraudulently conveyed a ship to a dummy corporation to avoid its attachment by the court. Justice Frankfurter, writing for the Court, observed that to deny an admiralty court jurisdiction over such a subsidiary equitable issue would strangely "hobble" the legal system, and said, "We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction." *Id.* at 691-92. And eleven years later, in *Vaughan* v. *Atkinson,* 369 U.S. 527, 530 (1962), the Court said, in discussing an award of counsel's fees, that, "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief."

Four years after *Vaughan,* in 1966, Congress extended the Federal Rules of Civil Procedure to admiralty cases. *See* Fed. R. Civ. P. 1. Some commentators took this as a further sign that admiralty could award whatever relief was appropriate in a given case. The idea that admiralty could not grant injunctive relief was, they said, archaic jetsam; anchored in no more solid ground than history, it was best not left to be a "derelict on the waters of the law," *Lambert* v. *California,* 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). *See* Law of Admiralty 43 *cf. Zobel, supra,* at 382-85.

The question whether injunctive relief could be awarded was first addressed directly after 1966 by the Fifth Circuit. In *Lewis* v. *S. S. Baune,* 534 F.2d 1115 (5th Cir. 1976), it adopted the words of its Chief Judge in an earlier case and held that district courts sitting in admiralty may grant injunctive relief under Fed. R. Civ. P. 65:

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels."

534 F.2d at 1121, *quoting Compania Anonima Venezolana De Navegacion* v. *A. J. Perez Export Co.*, 303 F.2d 692, 699 (5th Cir.), *cert. denied*, 371 U.S. 942 (1962). *Accord*, *McKie Lighter Co.* v. *City of Boston*, 335 F. Supp. 663, 666-67 (D. Mass. 1971); *see Guillot* v. *Cenac Towing Co.*, 366 F.2d 898, 904 (5th Cir. 1966).

Defendants distinguish *Lewis* as a case in which injunctive relief was awarded on a claim ancillary to the maritime claim that formed the basis of jurisdiction. This is an accurate characterization of the case on its facts,[7] but the Fifth Circuit's discussion of the issue did not distinguish between injunctive relief for admiralty claims and such relief for claims heard in admiralty by virtue of the court's ancillary jurisdiction. Rather it suggested a rule of general applicability, noting the 1966 unification of procedure and the doctrinal development we have outlined above.

This circuit has discussed injunctive relief in admiralty in the past, but has not, until now, been faced directly with the question. In *Carroll*, *supra*, 512 F.2d at 9, we assumed that equitable relief was not available from admiralty courts. In 1976, however, in *A & R Marine Salvage* v. *McAllister Lighterage Line*, 544 F.2d 551, 553, we questioned whether this was "the present law," noting that the rule had been subject to great criticism and that the Supreme Court had suggested its demise.

[7] *Lewis* was an appeal from a permanent injunction and a conviction of contempt for violating a district court's temporary restraining order. The t.r.o. had been directed at preventing a shipping company's attorneys from contacting the plaintiffs directly, rather than through their attorneys (who were on contingency), in an effort to settle litigation arising out of a fatal ship collision. Although the court held that admiralty courts could award injunctive relief, it found that the district court's orders were improper. 534 F.2d at 1121-24.

We hold, with the question now before us, that courts sitting in admiralty may award injunctive relief in accordance with Fed. R. Civ. P. 65 in situations where such relief would be appropriate on land. This is a departure from the traditional rule, but we find no constitutional, statutory or policy reasons of substance for recognizing a continued limitation upon the power of federal courts sitting in admiralty, nor does it seem likely that the Supreme Court would today adhere to the traditional rule. *See Swift & Co.*, *supra*, 339 U.S. at 692. District courts sitting in admiralty, which now operate under virtually the same procedures as they do otherwise, should be able to provide the kind or degree of remedy that will properly and fully redress an injury within their jurisdiction, in keeping with the same principles they would apply in other comparable cases. *See Swift & Co.*, *supra*, 339 U.S. at 691; Law of Admiralty 43. This is not to say, of course, that the rules and constraints affecting equitable jurisdiction on land will be ignored in admiralty—but merely that where equitable relief is otherwise proper under usual principles, it will not be denied on the ground that the court is sitting in admiralty.

SCOPE OF INJUNCTIVE RELIEF

Apart from the fact that the court was sitting in admiralty, defendants do not challenge its right to issue an injunction here. Rather their remaining complaint is of the scope of the injunction. Thus we assume, without deciding, that the district court properly found the equitable criteria necessary for an injunction. We address only whether the injunction was properly tailored "to remedy the specific harm shown," *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101, 108-09 (D.C. Cir. 1976). We bear in

mind that the award of injunctive relief, being committed to the discretion of the district court, is reviewable only for abuse. *Essex County Preservation Association* v. *Campbell*, 536 F.2d 956, 962 (1st Cir. 1976).

Defendants' primary objection is that the injunction prohibits them from raising the premiums for any of the eight prevailing plaintiffs for any reason. They argue that this interferes with their lawful business activity, and that the injunction should merely prohibit the imposition of an unjustified additional premium. Defendants also object to the prohibition against their requiring settlement sheets for vessels they insure. They argue that this aspect of the injunction interferes with their collection of information regularly and properly used in assessing premiums, and that it prevents them from obtaining information as to all seamen, not merely the eight prevailing plaintiffs.

We note, initially, that the injunction entered is a temporary one, effective pending disposition on the issue of damages and subject at all times to modification, if the district court is persuaded of a change in circumstances. The court found that none of Enos' legitimate underwriting criteria justified Enos' additional premium as to the eight prevailing plaintiffs at the time of its decision. Given these facts, the court did not abuse its discretion in ordering defendants not to raise plaintiffs' premiums. An insurance company is entitled, of course, to raise its premiums where legitimate considerations dictate. But the testimony elicited from Enos revealed that, in setting premiums, he relied on few, if any, objective criteria or statistical guidelines. The court found that Enos, whom it described as "evasive," set premiums largely on a subjective, ad hoc basis.[8] Given the difficulty the court would have faced in

[8] The district court found:

"[Enos] conceded that he has never consulted with any outside person, expert or otherwise, on loss experience, premium-setting, or any other technical aspect of the insurance business. He further conceded that, in fact, the amount of the added premium boils down to a subjective judgment on his part, which he claims makes the premium commensurate with the risk assumed by the insurance company in 'allowing' that man to be a member of an insured crew. Counsel stipulated that the rate of premium is free of any state or federal regulation. . . . After considerable evasion, Enos also admitted that 24 or 25 fishermen, out of a total insured work force of at least 200 men, were subject to an added premium."

policing an order allowing Enos to set only "legitimate" additional premiums in the face of his elusive rate-setting practices, and the indication that the higher premiums were being misused to deter seamen from exercising their rights, it was within its discretion to temporarily enjoin Enos from charging any additional premiums as to the eight plaintiffs.

We are less confident that the injunction against requiring settlement sheets from insured boat owners is appropriate. The interests of the prevailing plaintiffs would seem to have been fully protected by the injunction against raising their premiums; as this was not a class action, it is not clear that the injunction as to the settlement sheets was required. The court did find that the practice of requiring settlement sheets was adopted after the exclusionary endorsement system was enjoined by the federal district court in *Protection Maritime Insurance Co.* v. *Foley*, No. 70-1116-G (D. Mass. 1971), and that the list was used,

> "with an eye toward learning the earnings of the crew, the whereabouts of the crew and vessel, and, *most notably, the presence of any crew members who created, in [Enos'] sole judgment,* a special risk of loss."

(Emphasis added.) The court also found that these sheets were obtained after voyages were completed, that defendants "had no way of knowing who might be a crew member on an insured vessel prior to any given trip," and that defendants knew the consequences of their practices for

plaintiffs' employment prospects. It did not state, however, that the collection of the information on the settlement sheets had no legitimate function, or that requiring the settlement sheets was largely a way of pressuring boat owners into not hiring "blacklisted" fishermen. Given these facts and, in addition, the finding that Enos had some legitimate basis for requiring additional premiums for those plaintiffs whose claims were dismissed, we conclude that this aspect of the injunction is too broad. As the court may not have articulated fully its reasons for adopting this aspect of its order, however, we remand with instructions to vacate unless the court, after making suitable findings of fact, concludes that this aspect of the order is necessary to protect the rights of the eight prevailing plaintiffs.

The judgment of liability is affirmed, as is the order temporarily enjoining defendants from assessing higher premiums as to the prevailing plaintiffs. The order enjoining the use of settlement sheets is remanded for reconsideration in light of this opinion.

So ordered.

Appendix B.

"MANDATE"

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 78-1418.

JOHN PINO ET AL.,
PLAINTIFFS, APPELLEES,

v.

PROTECTION MARITIME INSURANCE COMPANY, LTD., ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT
Entered May 30, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of liability is affirmed, as is the order temporarily enjoining defendants from assessing higher premiums as to the prevailing

plaintiffs. The order enjoining the use of settlement sheets is remanded for reconsideration in light of the opinion filed this day.

Costs to appellees.

Certified and issued as
informal mandate under
F.R.A.P. 41 on Jun 20 1979

/s/ Dana H. Gallup
Clerk.

Costs in favor of appellees are
taxed at $77.34.

By the Court:
/s/ Dana H. Gallup
Clerk.

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
NO. 72-3396-C

JOHN PINO, ET AL,
Plaintiffs
v.
PROTECTION MARITIME INSURANCE
COMPANY, LTD., ET AL,
Defendants

OPINION

June 29, 1978

CAFFREY, Ch. J.

This civil action came before the Court for a non-jury trial on the issue of liability. Three of the original plaintiffs, Austin Ells, Roy Conrad, and George Spoon, Sr., died prior to trial. Their claims are being prosecuted by representatives of their estates. In addition, two of the original plaintiffs, Paul Scola and Matteo Militello, have withdrawn from the case at their own request. With the exception of Basil Catalini, the ten remaining plaintiffs are commercial fishermen and seamen, or were so employed at and prior to the time the case was commenced. Catalini is employed, at least part-time, as a lumper, *i.e.*, a person who unloads fishing vessels. All of the plaintiffs, except Leslie Matthews, are currently residents of Gloucester, Massachusetts, or its vicinity. Matthews now lives in Maine.

Defendant Ernest A. Enos (Enos) is an insurance broker based in Bridgewater, Massachusetts, who has been in the marine insurance business for 20 to 23 years. He testified that he has brokerage offices in Gloucester, New Bedford, Boston, Miami, Brownsville, and Guatemala. Defendant Trans-Atlantic Marine Insurance Company (TA) is a Massachusetts corporation that acts as an insurance brokerage and a marine manager for several insurance companies, including defendant Protection Maritime Insurance Company, Limited (PMI). PMI is a corporation organized under the laws of England and has done business in Massachusetts at all relevant times. Of the remaining nineteen defendants (Boat Owners), each owned, operated, and controlled at least one fishing vessel. Sixteen of the nineteen are Massachusetts corporations with principal places of business in either Gloucester, New Bedford, Boston, Dartmouth, or Fairhaven. Two defendants, Silverio Gaspar and Pearl D. Gaspar, are Gloucester residents who as individuals owned, operated, and controlled a single fishing boat. Admittedly, plaintiffs, as well as the vessels of defendant Boat Owners, are engaged in commercial fishing on the high seas and in the territorial waters of the several states near Massachusetts ports. Their catch, which is unloaded in Massachusetts, is ultimately distributed in interstate commerce.

Count I of plaintiffs' amended complaint charges that defendants have engaged in a civil conspiracy to monopolize interstate trade and commerce in violation of the Sherman Antitrust Act, 15 U.S.C.A. §§1, 2, the Robinson-Patman Antidiscrimination Act, 15 U.S.C.A. §13, and the McCarran-Ferguson Act, 15 U.S.C.A. §§1011-15. In substance, it is alleged that defendant PMI, through its marine managers, defendants TA and Enos, offered protection and indemnity (P & I) insurance on fishing vessels and set boat-owner premiums substantially and artificially lower (as much as 50 percent lower in some cases) than the premiums of similar policies underwritten by competitor insurance companies. By this device, defendant PMI allegedly was able to provide insurance for 80 percent of the Gloucester fishing fleet, a market share that plaintiffs characterize as a "virtual monopoly" of the marine P & I insurance issued in Gloucester.

Plaintiff fishermen also claim in Count I that, at some time in the course of their employment, they sustained personal injuries sufficient to support actions at law against the respective boat-owner employers. They allege that after presenting their personal injury claims and being unable to reach any settlement with defendants PMI, TA, and Enos, or their Gloucester brokers and agents, they brought actions under the Jones Act, 46 U.S.C.A. §688, the general Admiralty and Maritime Law, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §901, *et seq.* It is asserted that defendant Boat Owners thereafter refused to allow the litigating plaintiffs to return to work aboard their vessels, because of either the express instructions of PMI or a demand by that company's marine managers and brokers for additional, exorbitant premiums (alleged to be $5,000 in some cases) upon the rehiring of a designated fisherman. Plaintiffs charge that this practice of demanding unreasonable insurance premiums is an unprivileged and illegitimate business practice that has had the effect of making any named fisherman economically uninsurable, and therefore unemployable. Moreover, the added premium device is characterized by plaintiffs as a substitute for PMI's prior scheme of exclusionary insurance endorsements that was permanently enjoined by a Judge of this Court. *Protection Maritime Insurance Co., Ltd.* v. *Foley,* No. 70-1116-G (D. Mass. Nov. 16, 1971) (final decree).

Count I further alleges that defendant Boat Owners have conspired with PMI, TA, and Enos to create a climate of fear in Massachusetts fishing communities, with the effect of discouraging injured seamen from retaining counsel and enforcing their legal rights. To that end, it is charged that PMI, TA, and Enos have circulated a blacklist among local boat owners and captains, urging that the 146 designated seamen not be employed aboard their vessels. The alleged blacklist is attached to the amended complaint. Each of the plaintiffs claim that, as a result of this conspiracy, defendant Boat Owners refused or dicharged them from employment, even though the fishermen allegedly had recoverd from their injuries and were fit for sea duty. Plaintiffs claim that the conspiracy has prevented them from securing continuous, advantageous employment on fishing vessels, and caused them to suffer a loss of earning capacity, deprivation of employment rights, and humiliation in their home communities. Finally, plaintiffs assert that PMI, TA, and Enos knew full well the probable results of their conduct, and acted improperly, without any justification or privilege.

Plaintiffs seek seven items of relief under Count I: (1) the entry of a permanent injunction as to all acts by defendants tending to limit the employment or the employability of plaintiffs; (2) a decree declaring that defendants violated plaintiffs' rights by conspiring to attempt to deny the fishermen's constitutional rights; (3) a decree ordering that defendants place no discrimination or impediment in the way of a fisherman or lumper who is seeking employment, and who is otherwise competent and acceptable in his occupation; (4) a decree ordering that all fishermen be treated equally in seeking employment, without regard to any claims filed by them against defendants for personal injuries; (5) the entry of an injunction permanently enjoining defendants from issuing or circulating any lists of fishermen who sought counsel to secure their legal rights; (6) a judgment of $50,000 to each plaintiff, together with costs and attorneys' fees; and (7) treble damages to each plaintiff, together with costs and attorneys' fees.

Count II, which reiterates the allegations in paragraphs one to thirteen of Count I, charges that these same unprivileged and unjustified actions of the defendants violate plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution. Specifically, it is claimed that plaintiffs' freedom of contract under the due process and equal protection clauses of these Amendments has been violated. The relief requested under Count II is identical to the monetary and equitable relief sought under Count I.

Defendants answer that the added premiums were a valid exercise of their privilege to carry on their insurance business free from unreasonable restraint. It is asserted that the boat-owner premiums, in accordance with regular underwriting practice, were increased solely to provide for the extra risk of future injury posed by these particular plaintiffs during the course of admittedly hazardous employment. In support thereof, defendants cite the statements by plaintiffs in their claims or personal injury lawsuits alleging permanent total or partial disability, similar disclosures in interrogatories, and information concerning the fishermen's physical and moral character, age, and wellbeing set forth in "settlement sheets" periodically filed by boat owners with defendant insurers. Defendants go on to admit insuring a substantial number of Gloucester and New Bedford fishermen, but they deny possessing an 80 per cent share of the market. Finally, defendants deny all allegations of conspiracy, monopoly, or discrimination.

Jurisdiction is asserted here on the basis of a federal question, 28 U.S.C.A. §1331, and a civil admiralty dispute, 28 U.S.C.A. §1333. At the seven-day non-jury trial, the parties called 22 witnesses and introduced 14 exhibits, including correspondence, a handwriting specimen, an insurance endorsement clause, newspaper reports, a prior Massachusetts Superior Court finding and trial transcript, and various depositions and answers to interrogatories. Requested findings of fact and rulings of law also have been submitted. Pursuant to Fed. R. Civ. P. 52(a), I find and rule as follows.

The nub of this case is the role played by defendant Enos and the validity of his admittedly subjective underwriting evalauation of the plaintiff fishermen as grave insurance risks which he claims justifies the imposition of substantial added premiums on their employers. The starting place for the analysis is a description of the multi-tiered structure and operation of Enos' insurance enterprise.

Qua individual, Enos is an insurance broker who also acts as an insurance agent for TA. But as revealed by his own testimony, Enos' conduct as an individual broker is virtually indistinguishable, as a practical business and factual matter, from the actions authorized by TA and PMI. Enos is the president, the general manager, a 90% stockholder, and, by his own admission, the "boss' of the insurance brokerage business carried on by TA. TA directly (and Enos, indirectly) acts as the marine manager and underwriters' agent for PMI. As a marine manager, TA's primary duties are to designate the vessels to be insured, issue P & I insurance policies on such vessels for PMI, and set premiums commensurate with the insured-against risks. TA operates pursuant to a management contract with PMI, issuing policies only in the

name of the latter insurer. Enos' denial of administrative authority for PMI's daily operations is incredible in light of his controlling shareholder status. I do not believe this denial and find he has *de facto* control of PMI. Enos was an organizer of PMI in 1967, and has since increased his equity to a 70-75 percent position of ownership. He testified that his stock in PMI has a value between one-quarter and one-half million dollars. Moreover, Enos, upon examination by the Court, conceded that his majority interest allows him to dominate PMI's Board of Directors and to place any member who does not do his bidding. He thus controls the decisions and conduct of that corporation, despite the presence of ten other stockholders.

As to market share, Enos admitted, and I find, that he and his firms insure 70 to 75 percent of the Gloucester fishing fleet, as well as 20 to 25 percent of its New Bedford counterpart. Plaintiffs did not prove that these sizeable market shares were improperly obtained. In fact, there was testimony by several boat owners and captains that the regular premiums charged by Enos were quite comparable to those charged by prior competitors who have since abandoned maritime insurance, and by the approximately eight companies who presently insure the balance of the Gloucester fleet.

At dockside in Gloucester, New Bedford, and Boston, TA's insurance policies are administered by "producing" brokers. On a commission basis, brokers Eugene Marshall (now deceased), Ronald Gilson, and Robert Mitchell acted as Enos' agents in Gloucester, performing such duties as submitting prospective business, collecting premiums, preparing loss claims, interviewing personal injury claimants, obtaining medical reports, and, usually with Enos' approval, negotiating settlements of claims against PMI's

insureds. Although not TA employees, it is clear from the extent and duration of these duties that the named waterfront brokers were substantially identified and dealt with by the boat owners, captains, and fishermen as carrying out the mandates of Enos, TA, and PMI. In sum, I find that these brokers were agents with both actual and apparent authority to act for their principals, the defendant insurers.

In terms of the actual operation of this insurance business, a dockside broker would first attempt to convince the owner of a particular fishing vessel that his insurance requirements could be best met by a PMI policy. The broker would then submit a proposal to TA, acting as PMI's underwriting agent, that an insurance policy be issued covering the named vessel. If TA decided to issue the policy, it would determine a regular annual P & I premium to be charged per crewmember. The key factor in setting the regular premium is the loss ratio for the whole Gloucester fishing fleet in the immediate past two or three years, in relation to the gross premium charged for those years. There was some testimony by Enos that, in 1971, $650 represented the lower limits of the regular premium. Other testimony placed the regular premium at $800. This annual premium would be assessed on a pro rata basis, as measured by the duration of a particular crewmember's employment aboard an insured vessel. Such employment might be limited to a discrete voyage or could continue for months. The issuance and basic rate-setting decisions were made by the underwriting department of TA, a department that Enos, after some patently evasive answers, conceded actually consists of himself, *i.e.,* Enos *is* the underwriting department of TA.

Prior to November 16, 1971, Enos, through TA, had utilized an illegal tactic in the conduct of his insurance business. When certain fishermen attempted to ship as crewmembers, Enos issued an exclusionary "endorsement" to the boat's P & I insurance policy, which stated, in effect, that the designated fisherman was not covered under the vessel's policy. Because the boat owners were required to have P & I insurance on each member of the crew as a condition of the vessel's mortgage, the named fisherman would then be turned ashore and, predictably, barred from a steady "site" aboard any vessel insured by Enos. A series of cases was litigated on the issue of whether this practice was illegal and an abuse of legitimate business privilege. The upshot of separate decisions by the Massachusetts Superior Court and the Supreme Judicial Court, and a Final Consent Decree entered in this Court, was a finding that Enos, TA, and PMI had acted with malice and without privilege in impairing those plaintiffs' employment opportunities. Enos *et al* were permanently enjoined from refusing to provide maritime P & I insurance coverage to any person specifically designated by name in any insurance policy or endorsement thereto. *Protection Maritime Ins. Co., Ltd.* v. *Foley, supra; Pino* v. *Trans-Atlantic Marine, Inc.,* 358 Mass. 498, 265 N.E. 2d 583 (1970) (damages and injunction); *Foley* v. *Trans-Atlantic Marine, Inc.,* No. 18328 (Essex Superior Court June 18, 1970).

All parties agree that although Enos ceased writing exclusionary endorsements after the federal injunction issued, he then commenced the presently complained-of practice of charging boat owners additional premiums—over and above their regular premium—whenever certain fishermen crewed aboard an Enos-insured vessel. This new plan had several elements. First, for the last six or

seven years, the owners of all the vessels insured by Enos, TA, and PMI agreed to send a "settlement sheet" to Enos and TA after the vessel completes any fishing trip. To enforce this procedure, an owner's policy was subject to cancellation if a settlement sheet was not forwarded to the insurers within a few days after the trip was completed. Each settlement sheet disclosed the amount of fish caught, the price of the catch, the gross income received for the trip, a breakdown of the income received by each crewmember for his share of the work performed during that trip, and tax deductions. Most importantly, the settlement sheet contained the name and address of every member of the crew who went to sea aboard that vessel for that trip. Upon receiving these sheets, Enos reviewed them with an eye toward learning the earnings of the crew, the whereabouts of the crew and vessel, and, most notably, the presence of any crew members who created, in his sole judgment, a special risk of loss. If any putative high-risk fishermen appeared on the settlement sheet, Enos notified the boat owner that he was carrying a high-risk man and that an additional premium would be demanded if the boat owner wished to continue to include that man in his crew. Enos and TA, however, had no way of knowing who might be a crew member on an insured vessel prior to any given trip.

Enos, acting as TA's underwriting department, made the judgment that certain seaman were bad risks warranting an additional premium. He conceded that he has never consulted with any outside person, expert or otherwise, on loss experience, premium-setting, or any other technical aspect of the insurance business. He further conceded that, in fact, the amount of the added premium boils down to a subjective judgment on his part, which he claims makes the premium commensurate with the risk assumed

by the insurance company in "allowing" that man to be a member of an insured crew. Counsel stipulated that the rate of premium is free of any state or federal regulation. *See* Mass. Gen. Laws Ann. ch. 174A, §4(b) (West 1972). After considerable evasion, Enos also admitted that 24 or 25 fishermen, out of a total insured work force of at least 200 men, were subject to an added premium.

In making his determination, Enos says he weighed such factors as advanced age, health, physical disabilities, moral hazard (*e.g.*, arrests, involvement with the courts), severe drinking habits, the frequency of claims, and settlement refusals. Once a seaman reaches the age of fifty-five he is carefully scrutinized by Enos to determine whether he can continue to function as a fisherman and seaman. The annual added premium is calculated separately for each seaman, and, according to the testimony, varied from a low of $1,000 to a high of $6,500. An added premium on a seaman would be continued until such time as Enos and TA received some substantiation of a fisherman's claim that Enos' reason for instituting an added premium no longer existed. It is not clear, however, that this facet of Enos' policy was ever communicated to the high-risk fishermen. Only one seaman, not a plaintiff here, was able to produce such evidence. If the added premium was based solely on advanced age, there could never be any reduction or removal of the premium.

To facilitate his own added-premium rate-setting, Enos compiled personal records for the past fifteen or twenty years on all area fishermen sailing on vessels insured by TA. Enos says he relies heavily on the information in these files, and on the occasional input from the waterfront brokers, in deciding to demand an added premium and in setting its rate. The information contained in these files is derived from medical reports submitted to

TA in connection with claims against defendant insurers, pleadings in past suits commenced by the seamen, interrogatories and depositions on file as court documents, and investigative reports.

Turning now to the resolution of the liability issues raised by the plaintiffs, I find and rule as follows:

The proof submitted by plaintiffs relative to the antitrust causes of action alleged in Count 1 does not provide an adequate legal basis for holding any of these defendants liable. Plaintiffs have failed to prove the antitrust allegations by a preponderance of the evidence.

Plaintiffs have failed both to allege and to prove that defendant insurers charged different premiums, whether regular or added, to separate boat owners who shipped the same seamen. *See Carroll* v. *Protection Maritime Ins. Co.*, 512 F. 2d 4, 9 (1st Cir. 1975). Consequently, the element of price discrimination, essential to any action under the Robinson-Patman Antidiscrimination Act §2, 15 U.S.C.A. §13, has not been established. Plaintiffs' allegations of a restraint of trade and of a civil conspiracy to monopolize, under sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C.A. §§1, 2, likewise have not been proved.

Plaintiffs cite no cases in support of their jurisdictional and substantive claims concerning violations of their freedom of contract and constitutional right to work under the due process clauses of the Fifth and Fourteenth Amendments. It is axiomatic that the state or the federal government must have taken property without due process for a plaintiff to be deprived of rights protected by either of these clauses. *E.g., Ripon Society, Inc.* v. *National Republican Party*, 525 F. 2d 567, 574 n.16 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976); *Fletcher* v.

Rhode Island Hospital Trust, 496 F. 2d 927, 929 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974). Any taking here could only have been accomplished by the defendants, all of whom are private parties. The subjection of the business of the defendant insurers to state regulation is an insufficient nexus to characterize their action as being under color of state law. *See, e.g., Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350-54, 358 (1974). Consequently, I rule that plaintiffs' constitutional claims should be dismissed for lack of state action.

Plaintiffs' remaining legal claim is that defendants' conduct constituted a maritime tort within the admiralty jurisdiction of the Court. In a tort action closely related to this one, the Court of Appeals for this Circuit, focusing on where the impact of the alleged maritime tort occurred, abandoned the strict locality rule based on the traditional navigable waters/land dichotomy. *Carroll* v. *Protection Maritime Ins. Co., supra* at 5-9. The Court held that a cause of action against the insurer of a seaman's employer for tortious interference with a seaman's present or prospective employment did lie within the admiralty jurisdiction provided by 28 U.S.C.A. §1333(1). *Id.* at 9. I rule, therefore, that admiralty jurisdiction is well-founded in the instant case.

No federal statute providing a cause of action for tortious interference with a seagoing employment relationship has been brought to the Court's attention. Nor is the Court aware of any federal common law establishing such a theory in admiralty jurisdiction. Mindful of the special concern for uniformity in admiralty tort litigation, *Carroll* v. *Protection Maritime Ins. Co., supra* at 6, the Court believes that the Restatement (First) of Torts, §766 (1939) supplies a recognized national standard from which to fashion a controlling principle of substantive federal maritime law. Section 766 provides in pertinent part:

> [O]ne who, without a privilege to do so induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or
>
> (b) enter into or continue a business relation with another
>
> is liable to the other for the harm caused thereby.

This conclusion is reinforced by the fact that Section 766 has also supplied the standard of liability in similar cases decided by the Massachusetts courts. *E.g., Pino* v. *Trans-Atlantic Marine, Inc., supra* at 503-04; *Owen* v. *Williams,* 322 Mass. 356, 360, 77 N.E. 2d 318 (1948); *Foley* v. *Trans-Atlantic Marine, Inc., supra.*

Obviously, neither the mere refusal of a fisherman to accept offered work, nor the inability of a seaman to obtain work because of general market conditions, constitutes sufficient grounds for holding either Enos or the other defendants liable to these plaintiffs. The question of liability turns on the validity of Enos' subjective evaluation of the plaintiff fishermen as poor risks, *i.e.*, whether he acted in good faith in applying his rate-setting criteria to each seaman. Enos, through his counsel, disclaims any motive for the added premiums other than covering an increased risk. Given the hazards of fishing duty, Enos may well have been within the bounds of privileged underwriting judgment if the added premiums were assessed primarily on the basis of advanced age, present physical disability, or severe drinking habits. However, I am convinced, by a clear preponderance of the evidence, that eight of the fourteen plaintiffs were designated as added-premium seamen not for legitimate risk-related reasons but because of their inability to amicably settle insurance claims to Enos' satisfaction, and because of their retention of counsel, filing of personal injury actions, and prosecution of those claims to judgment, as they had every right to do.

By way of illustration of the basis of so ruling, I find that plaintiff Willis Powers is a fisherman from Gloucester who is presently 71 years of age. He has fished for approximately 50 years and has been a captain for about 20 of those years. Powers has submitted only one insurance claim during that time. Enos testified that, since 1971, TA has required an added premium of $1,500 for any vessel shipping Powers. Enos declares that the premium demand and the specified rate are justified because Powers is of advanced age, has a kidney tumor, a hernia, and a groin abcess, and has suffered a lung injury from smoke inhalation. Enos also asserted that he placed Powers in the advanced-age category at the age of 57, judging him then to be "somewhat incapacitated to function as a full-fledged seaman."

Other testimony, however, which I believe, conflicts sharply with Enos' depiction of Powers as an aged seaman still suffering from a variety of disabling ailments. For instance, it was established that Powers' lung injury and hernia operation occurred as long ago as 1966, while his groin abcess was diagnosed in 1967. Powers also was only out of work for three months in 1966 due to smoke inhalation. Defendant insurers' assertion of Powers' physical disability for sea duty is also contradicted both by Powers' own declaration of good health, and by the fact that the owners of the KISMET and the BEATRICE & IDA, two fishing vessels insured by a different maritime insurance company, judged Powers to be a capable and physically-fit enough mariner to appoint him captain of their vessels. In addition, William Mansfield, captain and owner of the fishing vessel SEA BREEZE, testified that Powers was an excellent fisherman whom he would hire at any time, but for Enos' demand through Gilson for an additional premium.

There also was testimony that Powers retained a lawyer when Enos' Gloucester broker, Eugene Marshall, refused to settle Powers' claim for payment of his hospital and physician bills. From the point in time after he secured the assistance of counsel, Powers was denied a site on some 20 fishing boats because of an added premium request or the presence of his name on the alleged blacklist. Since then, Powers has been relegated to only occasional transient sites on vessels insured by Enos. At least one boat captain suggested to Powers that if the latter dropped his case against Enos, the added premium would be removed and Powers would be given a site.

On balance, I find that medical considerations, age, and frequency of claims were not the predominant underwriting factors used by Enos in assessing Powers as a poor risk. The coincident timing of Powers' single instance of retaining counsel and of the imposition of an added premium lead me to the conclusion that the two events were causally related. Therefore, I find that Enos' subjective determination of Powers as a high risk was unreasonable and not an exercise of legitimate business judgment.

Plaintiff Robert Nugent is 46 years of age. He has worked as a cook and a deckhand in the Gloucester fishing fleet for approximately 25 years. Enos, relying on information in TA's files, has designated Nugent as a moral hazard, because of his "severe" drinking habits and his irresponsible, "playboy" behavior. At trial, Enos coyly maintained that while an increased premium of $1,250 had been administratively assigned to Nugent, TA had never had occasion to require payment of such a premium from a boat owner. But I find that assessment, without actual payment, was still sufficient to deter Nugent's employment.

Nugent testified that, while aboard the MANUEL P. DOMINGUS, he sustained blood poisoning in both arms. That injury prevented him from working for about six weeks. In the absence of counsel, Nugent refused to discuss with Marshall any settlement for his three missed trips. Upon retaining counsel (but not before), Nugent experienced difficulty in obtaining a fisherman site. Since 1969, his work has been limited to employment ashore as a cook and to random one-shot trips accomplished prior to the return to Enos of a vessel's settlement sheet. According to Nugent, added-premiums demands have led to his discharge from at least three boats. The contrary testimony of Captain Dominic Montanino of the CURLEW is simply not credible. Nugent also testified that the present state of his health is excellent and he feels able to work as a fisherman. There is no evidence of record for Enos' alleged opinion that Nugent's independent income made him unreliable.

Accordingly, I find again that TA's increased premium as to Nugent is not based upon age or permanent disability. Nugent's subsequent employment record, as well as the absence of any corroboration of Enos' charge of severe drinking habits, persuade me that this demand for an added-premium was based primarily on Nugent's failure to reach a settlement rather than any moral hazard impairing his capabilities as a seaman.

Plaintiff Michael Vaiarella is 61 years of age. In his 40 years as a fisherman, Vaiarella has filed three insurance claims, all within the last ten years. His usual shipboard job has been as a cook and deckhand. Vaiarella suffered an elbow injury as a member of the crew of the AGATHA & PATRICIA approximately 14 years ogo and pursued his claim to trial in this Court. He was unsuccessful in state-court litigation arising out of wrist and

hand injuries sustained aboard the MARIS STELLA in 1963.

Vaiarella also received a head injury aboard the SANTA RITA III in 1970. In a related claim filed with TA, he complained of dizziness, pain, and numbness of the head in May, 1971, and he was out of work for a few months. When Marshall refused to consider any settlement, Vaiarella hired a lawyer. Subsequently, TA, in a letter signed by Enos, notified the owners of the CAROLE & GARY that an added premium of $3,500 would be required for this plaintiff. Consequently, for the past five or six years, Vaiarella has been denied steady employment on at least eight named fishing vessels. Vaiarella testified that the captains of the CURLEW, NATALIE III, and the CAROLE & GARY cited blacklisting and the added premium as reasons. I disbeleive Captain Montanino's denial of making such a statement. Faced with the alternative of paying the extra premium himself or being turned ashore, Vaiarella found himself limited to single-trip sites. The only exception is that this plaintiff obtained a steady site for 1975 on the *uninsured* GAETANO S. Vaierella has not worked since making two single trips in 1976. He asserts that he is in good physical condition with no present limitations from his prior arm, elbow, or eye injuries. Former boat owner James Russo referred three times in his testimony to Vaiarella's fine abilities as a fisherman.

Contrary to defendant's requested inference from these facts, I find that neither age, past injuries, so-called moral hazards, or frequency of claims provided a sufficient basis for levying an added-premium of $3,500 against Vaiarella. The dates of Vaiarella's injuries, Russo's testimony as to this plaintiff's talents, and Vaiarella's ability to obtain one uninsured steady site, as well as occasional transient sites, are credible evidence of his fitness and

capability as a fisherman. Therefore, Vaiarella's two personal injury lawsuits and his inability to settle his 1971 claim emerge as, and I find were, the paramount and improper reasons for his designation by Enos as a "poor risk."

Plaintiff John Pino is 61 years of age. He has been engaged as a fisherman, deckmate, engineer, and captain for 40 years. He filed two insurance claims in that time. He has been unemployed since September, 1976. Pino cut his finger aboard the WILD DUCK in 1967, so damaging the finger's nerves that an operation was required one year after the accident. Pino declares he now has no physical disabilities of any kind that hinder him from working, and has 90 per cent use of his injured finger. This assertion is not substantially overcome by Pino's prior testimony, in 1969, that the motion of his finger was limited and that he was not 100 per cent at that time.

Pino retained counsel after Marshall refused to provide reimbursement for hospital and physician bills connected with the finger injury. Shortly thereafter, Pino was denied a steady site aboard the ST. ANTHONY because its captain claimed that Pino was on the blacklist. According to Pino, Marshall then informed him that he would not be able to obtain another site in Gloucester unless he discharged his lawyers and signed a release. By refusing to comply with this demand, Pino found himself unable to secure a steady local site, having to fish out of ports as far away as New Jersey, and relegated to work ashore in fish processing plants. I find that Pino was specifically denied employment on six boats, either because of an added-premium demand ranging from $3,000 to $6,500 or the insureds' belief that Pino was blacklisted. Pino, like all the other fishermen, conceded that he had never actually seen a blacklist. As to those boat owners who did

not cite the added premium or the blacklist, none gave Pino a substitute reason for turning him away. In some instances, a boat would go to sea one man short, or other men would be hired for the site immediately after Pino was refused a position. While Pino, like other plaintiffs, was not refused a site on the uninsured GAETANO S, he declined employment thereon because in his opinion the vessel was a "junk boat" and a notoriously poor moneymaker. Although Pino refused, in at least two instances, to accept a site, that fact is hardly enough to justify his poor risk designation. It is also noteworthy that at least one captain rated Pino as a first-class fisherman.

In sum, I find that none of Enos' stated underwriting criteria support an exorbitant premium in Pino's case. The added premiums are admittedly not based on either age or the presence of a moral hazard. I further find that Pino's finger injury is not sufficient justification for his poor risk designation, given Pino's credible testimony concerning recovery, the ten years that have elapsed since his injury, and the use of his finger demonstarted in the courtroom. Nor does the filing of two claims mark Pino as a professional claimant. Accordingly, I conclude with respect to Pino, that Enos did not act in good faith or within the bounds of his legitimate underwriting privilege.

Plaintiff Russell A. Thompson is 35 years of age and has been a fisherman for 16 years. He has filed only a single claim and has never been involved in other litigation with these defendants. The plaintiff has often been confused with his older uncle, Russell J. Thompson, who is also a fisherman. Enos denied ever demanding an added premium for plaintiff Thompson, asserting instead that such a premium was assessed against the elder Thompson, whose medical history clearly supported an added premium. But

John Shanahan, captain of the VILLANOVA, testified that he turned the younger Thompson ashore upon receiving a letter from Enos imposing an added premium on this plaintiff. Although Shanahan's testimony was introduced by deposition, I find it to be more credible than the contradictory testimony of the financially-interested Enos.

Thompson suffered badly bruised legs and a slight back injury when he fell down an open hatch aboard the MARC ANTHONY in 1969. Although briefly hospitalized, he recovered sufficiently to return to fishing in four or five weeks. Marshall informed Thompson that if settlement of the claim for a month's lost earnings was refused, Thompson would find himself unable to obtain another site in Gloucester or New Bedford. Thompson rejected Marshall's offer of up to $300 as insufficient, and then retained counsel. Subsequently, the younger Thompson was subjected to an added premium ($1,000 in at least one case), and was denied a steady site on five fishing boats, either being rejected outright or being turned ashore after a single trip. It is uncontradicted testimony that at least three of the captains or boat owners, at some point in time, cited instructions from the insurance company or Thompson's presence on the blacklist as justification for denying employment. Although Thompson claims to be in perfect health, he has been forced to work as a dockside lumper and as a bartender because of his inability to obtain work at sea. One boat captain testified that Thompson, on one occasion, failed to appear at a scheduled departure time. While this suggests that Thompson could be undependable, it does not justify the insurers' imposition of an added premium.

On balance, I find that Russell A. Thompson was the subject of an added premium, and that the premium increase was not supported by advanced age, permanent disability, a moral hazard, or a high incidence of claims. Conse-

quently, I find that defendant insurers acted unreasonably and without business privilege as to Thompson.

Plaintiff Robert Taylor is 53 years of age. In 35 years of fishing, Taylor has filed only one claim. This plaintiff is missing part of his thumb and the third and fourth fingers on his left hand. Taylor claims to have had only one accident, a fractured left wrist, aboard the CURLEW in 1971. When Taylor pressed a claim for his living expenses during recovery, Marshall refused to consider it unless Taylor signed a release. Taylor refused and consulted counsel. After a number of weeks, Taylor returned to fishing and made a single trip aboard the CURLEW. But Taylor was turned ashore when Marshall informed the boat owner that Taylor could not be shipped because he was on the blacklist. Taylor then made four trips on the EMILY BROWN, and then terminated his services for bona fide personal reasons and not as a result of defendants' conduct. After three or four trips aboard the ST. JUDE, the captain notified Taylor that correspondence from Marshall had named him as a bad insurance risk, and that he would be turned ashore because the owners could not afford the added premium. Enos noted in his testimony that there are two fishermen named Robert Taylor and contended that an added premium of $2,500 to $3,000 had been assessed against only the Robert Taylor who is not a plaintiff here.

Plaintiff Taylor subsequently served on a Long Island, New York boat, and made nine or ten trips on a Boston boat, before he, along with the rest of the Gloucester crew, quit because of the burden of commuting to Boston. Taylor has sought employment but has been unable to obtain a steady site on a larger boat because of the added premium. He has refused to seek a site on smaller uninsured boats, and, as a consequence, has worked only as a clamdigger since 1973.

Again, I find the fisherman's testimony more credible than that of Enos. Enos, through his agent Marshall, did prompt Taylor's discharge from the CURLEW and the ST. JUDE. However, I find that some added premium was within defendants' underwriting privilege because of Taylor's unfortunate permanent partial disability, namely, the missing fingers and thumb on his left hand. I further find that defendant has failed to show what added premium would be reasonable in Taylor's case.

Plaintiff Lorenzo Susanno is 40 years of age, and claims to have been a fisherman for the past 30 years. This plaintiff has admittedly been treated by TA as a bad risk requiring an added premium of $1,750. Enos claims that Susanno presents a moral hazard because he has worked under assumed names of actual Gloucester fishermen to avoid taxation.

Susanno suffered a smashed right thumb on the PAULA MARIA in 1971 and was out of work for three months. In 1973, Susanno's thumb had an ingrown nail and grew numb in cold and damp weather, interfering somewhat with his work. Enos testified that "decreased command of his right hand by virtue of his thumb" was the paramount ground for placing an added premium on Susanno. But presently the motion of Susanno's thumb is not impaired, and the only legacy from the injury is a slight scar.

Susanno made no effort to discuss an insurance settlement, but he did retain counsel and unsuccessfully litigated his PAULA MARIA claim before this Court. Although recovered sufficiently to go fishing, Susanno was turned ashore at some point in time by four boats because Enos had imposed an added premium. Most sites that Susanno has obtained have been limited to one to three trips. However, at the time of trial his site aboard the LILO had lasted for seven months. Captain Charles Cavanaugh testified that

although Susanno was a highly competent fisherman, the owners of two Enos-insured fishing boats forced Cavanaugh to discharge Susanno because of his inclusion on the insurance-risk blacklist. The impact of Susanno's rumored high-risk designation has even caused him to be turned ashore by two boats that are not insured by TA. I find that Susanno's substantial shipping history subsequent to his injury demonstrates that his thumb has not significantly hampered his fishing abilities. The only moral hazard posed by Susanno is that, under marital pressure, he made a single trip on the CAPE MAY under the name of another Gloucester fisherman in order to avoid taxation. However, taxes were withheld by his employer regardless of Susanno's use of an assumed name. Thus, the only remaining underwriting criterion is the incidence of Susanno's insurance claims. I find that a single and unsuccessful claim for a temporary disability is an insufficient and unprivileged basis for levying an added premium to protect defendant insurers against fraudulent, harassing claims.

The case of Leslie Matthews was submitted on the basis of Matthews' answers to defendants' interrogatories. Matthews was captain of the SAN ANDREA which sank in 1969 off Nova Scotia in a severe storm. Subsequently, Matthews neither lost his Master's License nor was made the subject of any U. S. Coast Guard disciplinary proceedings. Matthews claims that the added premium of $5,000 now assessed against him is retribution by Enos for the sizeable claims paid by the insurers in connection with the loss of the SAN ANDREA. Enos contends that the added premium is justified by Matthew's incompetence. As a result of the defendant insurers' conduct, Matthews was discharged as skipper of the PAUL & MARIA after three trips, was refused a promised position as captain of the THOMAS D., and was also refused employment aboard

the BLUE WATERS and the MOTHER FRANCES. He had to move to Maine to find steady employment as a fishing vessel master prior to his 1974 retirement.

Age, physical condition, and moral hazards clearly were not factors in the decision to impose an added premium upon Matthews. On the other hand, the loss of a ship under Matthews' command is precisely the sort of past experience an insurer has the right to consider. But I find, on the basis of Matthews' subsequent employment as a captain and the lack of any disciplinary action, that the added premium of $5,000 was exorbitant, vindictive, and well beyond the bounds of legitimate underwriting privilege.

I am not persuaded that a case has been proved by a fair preponderance of the evidence in support of the claims of the remaining plaintiffs Spoon, Catalini, Conrad, Ells, Testaverde, and Favazza.

George Spoon, Jr., testifying on behalf of his deceased father's estate, could not identify which boats had refused his father employment. His testimony also was vague as to several other particulars, such as the amount, if any, of assessed added premiums. I find that the fact that Spoon Sr. was missing two fingers and a thumb on the same hand presents a basis for some added premium, given the hazards of small-boat fishing and the heightened risk of danger from lessened dexterity.

Enos stated that no added premium had been assessed against Catalini. Catalini's testimony suggested that any work exclusions he experienced had been less serious than that of other plaintiffs. For instance, he has had no trouble lumping on any frozen fish freighters, and, indeed, as a senior lumper, has priority on any job to discharge fish from vessels. I also find that Catalini's susceptibility to dizziness and possible loss of balance, resulting from an injury in which a hook caught in his left eye, might justify

a reasonable additional premium, because looking up or down for periods of time is a common occurrence when a catch of fish or cargo is being unloaded by overhead basket. Moreover, Catalini did not prove the level of any present added premium.

The case of Ray Conrad, who is now deceased, was submitted on the basis of his deposition. Conrad's testimony is riddled with contradictions and uncertainty regarding the identity of the particular vessels and captains who turned him ashore. Moreover, Conrad's three serious injuries and higher than normal incidence of claims provide a basis for an added premium within the scope of an underwriter's privilege. I do not find on this record substantiation of the claimed "forced" nature of Conrad's retirement and change of residence to Nova Scotia. On balance, I conclude that Conrad's deposition does not present sufficient proof of the unreasonableness of Enos' added premium. Finally, there was no testimony on behalf of decedent Austin Ells, and plaintiffs Salavtore Testaverde and Samuel J. Favazza were not called as witnesses because they were at sea and unavailable. The cases of these last three plaintiffs were submitted on the assumption that the testimony offered by other plaintiff-witnesses provided a representative and sufficient showing that all added premiums levied by Enos were not justified. But since this law suit was never alleged to be, or certified as, a class action, each plaintiff has to prove by a preponderance of the evidence that he was subjected to an unprivileged and unreasonable underwriting determination by defendant insurers. Ells, Testaverde, and Favazza have not done so.

Enos would have the Court believe that the plaintiffs' laziness, not the added premiums, explain their inability to obtain permanent sites. But enough credible evidence was introduced to convince me that eight of the plaintiffs

did actively seek shipboard employment. Likewise, I am persuaded that, in most cases, boat owners and captains relied on the added premium as a bone fide reason for denying employment, and not as a substerfuge for turning away incapable or undependable seamen. Similarly, the facts that the fishermen were not members of a union or a particular family, or that a boat's ownership had changed, might explain isolated instances of discharge, but not the general pattern proven here.

Neither Enos nor any of his employees or brokers ever notified a boat owner prior to obtaining a settlement sheet that the presence of certain seamen necessitated an added premium. Enos denies that his internal office list of high-risk fishermen is a matter of public knowledg, either as a general matter or within the fishing industry in particular. Because the prior "endorsement list" attached to the amended complaint is no longer in effect, I find that it does not constitute an actual blacklist for purposes of this litigation. But the communication of the names of the designated fishermen by word of mouth through the closely-knit fishing industry and the barrooms and clubs of the fishing ports, as well as through reports in the local newspapers, belies defendants' formalistic efforts to disassociate themselves from the drastic effect of the additional premiums on plaintiffs' employment opportunities. No fisherman, boat owner, or captain observed the circulation of an actual blacklist. But it is clear, and I find that even without a written one, those in the fishing industry knew whom the "blacklisted" men were.

It is undeniable, and I find, that the effects of the added premium scheme upon the employment opportunities of Powers, Nugent, Vaiarella, Pino, Thompson, Taylor, Susanno, and Matthews were severe, continuing, and directly caused by Enos' unjustified or exorbitant demands for additional premiums. Of the fishermen who testified, every

one that was stigmatized as a high risk found himself turned ashore from several Enos-insured boats. I most cases, the boat owners relied on the demand for an added premium as the reason for discharge; in some instances, however, the reasons for a refusal of employment were not given or a reference was made to the blacklist. In addition to the loss of an existing job, the turned-away fishermen suffered further refusals of employment from other boat owners (even those not insured by Enos) when their high-risk designation became known by word of mouth throughout the fishing fleet. Their prospects thus were limited to an occasional transient site on an Enos-insured vessel, work aboard a small boat that was uninsured by Enos and generally low-paying, a site aboard one of the few large Gloucester boats not insured by TA, a site aboard an out-of-state vessel, or employment ashore. The net result of the added premium scheme has been a continuing hardship, a loss of employment, a loss of employability, and humiliation.

I find and rule that plaintiffs Powers, Nugent, Vaiarella, Pino, Thompson, Taylor, Susanno and Matthews, as commercial fishermen, had a reasonable expectancy of financial benefit from their existing employment relationships with defendant boat owners and from job opportunities normally available even in the absence of formal contracts of employment. *See Owen* v. *Williams, supra* at 361-62; Restatement (First) of Torts, §766, Comment c (1939). In finding favorably to these eight plaintiffs, I particularly have in mind the lack of credibility inherent in the interested testimony of the defendant boat owners and broker Gilson. My disbelief of the boat owners' testimony is based on their demeanor, the nature of their testimony, and on the fact that, because of the unfettered freedom Enos had to set their P & I premiums, they were under de facto economic duress to testify favorably to Enos' position in

this case. As for Gilson, I accord no weight to his claim that his primary obligation was to the boat owners. Rather, the evidence convinces me and supports a finding that Gilson fully realized that his bread was buttered by TA and Enos, and that his loyalty was to them rather than to an attempt to testify objectively.

I find that Enos, TA, and PMI knew that the consequences of their practice of levying exorbitant added P & I premiums would be the discharge of the designated seamen by the boat owners, and the discouragement of these plaintiffs from seeking legal representation and from prosecuting work-related injury claims under federal maritime law. Restatement (First) of Torts, §766, Comment e (1939). As a result, the economic pressure exerted on the boat owners by the added premiums constituted a purposeful inducement and cause on the part of defendant insurers to disrupt or abort the relationships of employment at will existing between the fishermen and the boat owners. *Id.* Comments d, j. The added-premium scheme, acting as a substitute for the previously enjoined exclusionary endorsement system, constituted the promise of a benefit, *i.e.*, lower premiums, to the boat owners if they refrained from dealing with the targeted seamen. *Id.* Comments f, g. The Court, however, expresses no opinion on whether defendant insurers acted with malice or ill will, since such a finding is not essential to proof of Section 766 liability. *Id.* Comment m; *see Republic of Italy* v. *DeAngelis,* 206 F.2d 121, 130 (2d Cir. 1953) (petition for rehearing) (Clark, J., concurring) ("It is clear that the actor cannot excuse himself merely by showing he intended to benefit himself and had no ill will.")

I also rule in agreement with the related opinion of then Superior Court Judge Campbell, *Foley* v. *Trans-Atlantic Marine, Inc., supra,* that defendants' intentional tortious

interference with plaintiffs' employment relationships was not privileged. *See* Restatement (First) of Torts, §§767, 769 (1939). The initial burden of establishing a privilege is a matter of defense resting on the insurers. *E.g., Tye* v. *Finklestein,* 160 F. Supp. 666, 668 & n.1 (D. Mass. 1958); *Owens* v. *Williams, supra* at 360. They have not carried that burden. The conduct proven here represents more than the mere exercise of an insurer's freedom to set the conditions and rates for his policies. *See* Restatement (First) of Torts, § 766, Comment g (1939). Accordingly, I rule that the added premiums levied on these eight plaintiffs were unreasonable, improper, and, therefore, unprivileged means of protecting the insurers' financial interests.

The defendant boat owners, who were caught in this cross-fire between the insurers and the fishermen, quite naturally considered the extent of the premiums to be paid in selecting their crew members. Maintaining a good crew and obtaining the lowest possible premiums are legitimate and justified business practices in the fishing industry. Consequently, I rule that none of the defendant boat owners purposely interfered with the employment expectancy of the eight plaintiffs; and even if their predictable response to the added-premium requests could be so characterized, the discharges were privileged as proper means of protecting the boat owners' precarious financial position. *Id.* §§766, 769(a).

In light of the foregoing, a hearing will be held on the issue of damages sustained by the eight plaintiffs designated above as having sustained their burden of proof. Pending that hearing, I rule that it is appropriate to grant plaintiffs interim injunctive relief.

In so ruling, I am not unmindful of the dictum contained in the opinion of the Court of Appeals for this Circuit in *Carroll* v. *Protection Maritime Insurance Co., Ltd., supra,*

at 9, to the effect that "because of the historic unavailability of equitable relief in admiralty, the plaintiffs' prayer for injunctive relief cannot be granted even should they prevail on the merits." Any precedential value that that dictum would otherwise have in this Circuit is dissipated by an observation of Chief Judge Coffin, speaking for the Court of Appeals in a subsequent decision handed down in *A & R Marine Salvage* v. *McAllister Lighterage Line,* 544 F. 2d 551, 553 (1976). There, with reference to the statement "admiralty courts lack this power [to grant injunctive relief]," Judge Coffin stated

> In the past we have assumed this point. *See Carroll* v. *Protection Maritime Ins. Co, Ltd.,* 512 F.2d 4, 9 (1st Cir. 1975). The *Schoenamsgruber* doctrine, however, has been criticized as unnecessarily crippling an admiralty court's power to do justice, *see* G. Gilmore & C. Black, *The Law of Admiralty* p. 41 (2d ed. 1975), and several Supreme Court opinions subsequent to *Schoenamsgruber* suggest that the limitation may no longer apply. *See Vaughan* v. *Atkinson,* 369 U.S. 527, 530, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); *Swift & Co. Packers, Inc.* v. *Compania Colombiana Del Caribe, S.A.,* 339 U.S. 684, 691-92, 70 S.Ct. 861, 94 L.Ed. 1206 (1950). Moreover, the limitation may not have survived the procedural unification of admiralty with the ordinary civil action. *See* Colby, *Admiralty Unification,* 54 Geo.L.J. 1258, 1268-69 (1966).

I rule that this observation from *A & R Marine Salvage* leaves the question of the availability of injunctive relief in admiralty cases an open issue in this Circuit. I further rule that, in light of several observations by the Supreme Court and the opinion of the Court of Appeals for the Fifth Circuit in *Lewis* v. *S.S. Baune,* 534 F.2d 1115, 1120-21 (1976), that issue should be resolved favorably to the exercise of

equitable jurisdiction on the facts of this case which cry out for the same. *Lewis* was decided after the procedural unification of admiralty with the ordinary civil action referred to by Judge Coffin in *A & R Marine Salvage, supra.* Recognizing this unification, the Fifth Circuit observed:

> We see no reason why the injunctive powers contained in Rule 65, F.R.Civ.P., should be prohibited to the district court sitting in admiralty.
>
> . . . .
>
> We believe that all courts, both seagoing and landlocked, have inherent power, within certain limits, to control the conduct of the parties who have subjected themselves to the jurisdiction of the courts. Injunctive relief, where warranted, can be a useful tool to aid a court in controlling the conduct of litigants. *Id.* at 1121.

Accord McKie Lighter Co. v. *City of Boston,* 335 F. Supp. 663, 666-67 (D. Mass. 1971), C. Wright, A Miller, & E. Cooper, 14 *Federal Practice and Procedure* §3671, at 272-73 (1976).

This ruling in *Lewis* was foreshadowed by the opinion of the Supreme Court in *Swift & Company Packers* v. *Compania Caribe,* 339 U.S. 684, 691-92 (1950), where the Court observed: "We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction. . . ." A similar and stronger statement of the same opinion appears in *Vaughan* v. *Atkinson,* 369 U.S. 527, 530 (1962), where the Court stated: "Equity is no stranger in admiralty; admiralty courts are, indeed, authorized to grant equitable relief. . . ."

Accordingly, an order should enter enjoining the above-described practices.

/s/ Andrew A. Caffrey
Andrew A. Caffrey, Ch. J.

Appendix D.

UNITED STATES CONSTITUTION, ART. III
[*in pertinent part*]

Section 2, Clause 1. [Subjects of jurisdiction]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority,— to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C. § 1333

§1333. [Admiralty, maritime and prize cases]

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(June 25, 1948, c. 646, § 1, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.)

46 U.S.C. § 740

§ 740. [Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period]

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act [46 USCS §§ 781 et seq.] or Suits in Admiralty Act [46 USCS §§ 741 et seq.], as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this Act [enacted June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act. Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. (June 19, 1948, ch 526, 62 Stat. 496.)

FED. R. CIV. P. 65

Rule 65. [Injunctions]

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing with Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury.

(b) Temporary Restraining Order; Notice; Hearing; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedent of all matters except older matters of the same character; and when the motion comes on for hearing the

party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof. The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) Employer and Employee; Interpleader; Constitutional Cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and em-

ployee; or the provisions of Title 28, USC, § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, USC § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

FED. R. CIV. P. 82

Rule 82 [Jurisdiction and Venue Unaffected]

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, USC §§ 1391-93.